

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELLE WAKE,)
) No. CV-09-3036-JPH
Plaintiff,)
) ORDER GRANTING DEFENDANT'S
v.) MOTION FOR SUMMARY JUDGMENT
)
MICHAEL J. ASTRUE, Commissioner)
of Social Security,)
)
Defendant.)
)
)
)

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on May 7, 2010 (Ct. Rec. 17, 19). Attorney D. James Tree represents plaintiff; Special Assistant United States Attorney David R. Johnson represents the Commissioner of Social Security ("Commissioner"). The parties consented to proceed before a magistrate judge (Ct. Rec. 7). On March 22, 2010, plaintiff filed a reply (Ct. Rec. 21). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 19) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 17).

JURISDICTION

Plaintiff protectively applied for supplemental security income (SSI) benefits on December 7, 2005, alleging onset as of

1 January 1, 2003, due to bipolar disorder, agoraphobia, post-
2 traumatic stress disorder (PTSD), and depression (Tr. 79-81, 91).
3 The application was denied initially and on reconsideration (Tr.
4 39-40, 44-47). Administrative Law Judge (ALJ) R.S. Chester held a
5 hearing on October 29, 2008. Plaintiff, represented by counsel,
6 and vocational expert Fred Cutler testified (Tr. 228-251). On
7 November 28, 2008, the ALJ issued a decision (Tr. 12-26) finding
8 plaintiff disabled when substance abuse is included (Tr. 23). He
9 found DAA is a factor materially contributing to plaintiff's
10 disability determination (Tr. 25-26). The ALJ found when DAA is
11 excluded, plaintiff is not disabled. Accordingly, he found
12 plaintiff not disabled (Tr. 25-26). The Appeals Council denied a
13 request for review on February 20, 2009 (Tr. 3-5). Therefore, the
14 ALJ's decision became the final decision of the Commissioner,
15 which is appealable to the district court pursuant to 42 U.S.C. §
16 405(g). On April 3, 2009, plaintiff filed this action for judicial
17 review pursuant to 42 U.S.C. § 405(g)(Ct. Rec. 2,4).

18 **STATEMENT OF FACTS**

19 The facts have been presented in the administrative hearing
20 transcript, the ALJ's decision, referred to as necessary in the
21 briefs of both plaintiff and the Commissioner, and will only be
22 summarized here.

23 Plaintiff was 37 when she applied for benefits and 40 years
24 old at the hearing. She has a tenth or eleventh grade education
25 and has not earned a general equivalency certificate (Tr.
26 95,119,131,166,236). Plaintiff testified she last drank alcohol
27 about a month before the hearing (Tr. 233,238). DAA is at issue
28 because during the relevant period plaintiff used heroin, cocaine,

1 prescription pills, methamphetamine, and alcohol (Tr. 165-
2 167,204,206), and underwent treatment for DAA on several occasions
3 (Tr. 118,123,144,167,198).

4 SEQUENTIAL EVALUATION PROCESS

5 The Social Security Act (the "Act") defines "disability"
6 as the "inability to engage in any substantial gainful activity by
7 reason of any medically determinable physical or mental impairment
8 which can be expected to result in death or which has lasted or
9 can be expected to last for a continuous period of not less than
10 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
11 also provides that a plaintiff shall be determined to be under a
12 disability only if any impairments are of such severity that a
13 plaintiff is not only unable to do previous work but cannot,
14 considering plaintiff's age, education and work experiences,
15 engage in any other substantial gainful work which exists in the
16 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus,
17 the definition of disability consists of both medical and
18 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
19 (9th Cir. 2001).

20 The Commissioner has established a five-step sequential
21 evaluation process for determining whether a person is disabled.
22 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
23 is engaged in substantial gainful activities. If so, benefits are
24 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(I). If not,
25 the decision maker proceeds to step two, which determines whether
26 plaintiff has a medically severe impairment or combination of
27 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

28 If plaintiff does not have a severe impairment or combination

1 of impairments, the disability claim is denied. If the impairment
2 is severe, the evaluation proceeds to the third step, which
3 compares plaintiff's impairment with a number of listed
4 impairments acknowledged by the Commissioner to be so severe as to
5 preclude substantial gainful activity. 20 C.F.R. §§
6 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
7 App. 1. If the impairment meets or equals one of the listed
8 impairments, plaintiff is conclusively presumed to be disabled. If
9 the impairment is not one conclusively presumed to be disabling,
10 the evaluation proceeds to the fourth step, which determines
11 whether the impairment prevents plaintiff from performing work
12 which was performed in the past. If a plaintiff is able to perform
13 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
14 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
15 residual functional capacity (RFC) assessment is considered. If
16 plaintiff cannot perform this work, the fifth and final step in
17 the process determines whether plaintiff is able to perform other
18 work in the national economy in view of plaintiff's residual
19 functional capacity, age, education and past work experience. 20
20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
21 482 U.S. 137 (1987).

22 The initial burden of proof rests upon plaintiff to establish
23 a *prima facie* case of entitlement to disability benefits.
24 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
25 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
26 met once plaintiff establishes that a physical or mental
27 impairment prevents the performance of previous work. The burden
28 then shifts, at step five, to the Commissioner to show that (1)

1 plaintiff can perform other substantial gainful activity and (2) a
2 "significant number of jobs exist in the national economy" which
3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
4 Cir. 1984).

5 Plaintiff has the burden of showing that drug and alcohol
6 addiction (DAA) is not a contributing factor material to
7 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).
8 The Social Security Act bars payment of benefits when drug
9 addiction and/or alcoholism is a contributing factor material to a
10 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);
11 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001); *Sousa v.*
12 *Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). If there is
13 evidence of DAA and the individual succeeds in proving disability,
14 the Commissioner must determine whether DAA is material to the
15 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If
16 an ALJ finds that the claimant is not disabled, then the claimant
17 is not entitled to benefits and there is no need to proceed with
18 the analysis to determine whether substance abuse is a
19 contributing factor material to disability. However, if the ALJ
20 finds that the claimant is disabled, then the ALJ must proceed to
21 determine if the claimant would be disabled if he or she stopped
22 using alcohol or drugs.

23 STANDARD OF REVIEW

24 Congress has provided a limited scope of judicial review of a
25 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
26 the Commissioner's decision, made through an ALJ, when the
27 determination is not based on legal error and is supported by
28 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th

1 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
2 "The [Commissioner's] determination that a plaintiff is not
3 disabled will be upheld if the findings of fact are supported by
4 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
5 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
6 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
7 1119 n.10 (9th Cir. 1975), but less than a preponderance.
8 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
9 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
10 573, 576 (9th Cir. 1988). Substantial evidence "means such
11 evidence as a reasonable mind might accept as adequate to support
12 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401
13 (1971)(citations omitted). "[S]uch inferences and conclusions as
14 the [Commissioner] may reasonably draw from the evidence" will
15 also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir.
16 1965). On review, the Court considers the record as a whole, not
17 just the evidence supporting the decision of the Commissioner.
18 *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting
19 *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

20 It is the role of the trier of fact, not this Court, to
21 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
22 evidence supports more than one rational interpretation, the Court
23 may not substitute its judgment for that of the Commissioner.
24 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
25 (9th Cir. 1984). Nevertheless, a decision supported by substantial
26 evidence will still be set aside if the proper legal standards
27 were not applied in weighing the evidence and making the decision.
28 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,

1 433 (9th Cir. 1987). Thus, if there is substantial evidence to
2 support the administrative findings, or if there is conflicting
3 evidence that will support a finding of either disability or
4 nondisability, the finding of the Commissioner is conclusive.
5 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

6 **ALJ'S FINDINGS**

7 At step one the ALJ found plaintiff has not engaged in
8 substantial gainful activity since she applied for benefits on
9 December 7, 2005 (Tr. 14). At steps two and three, ALJ Chester
10 found plaintiff suffers from drug and alcohol abuse/dependence
11 (DAA), bipolar disorder with depression, and personality disorder,
12 impairments that are severe but do not alone or in combination
13 meet or equal the severity of the Listings (Tr. 15, 20). The ALJ
14 assessed an RFC with DAA included (Tr. 21). At step five he found
15 plaintiff disabled because he concluded there were no jobs she
16 could perform when DAA is included (Tr. 23).

17 Because he found plaintiff disabled when DAA is included, the
18 ALJ went on to perform the required second five step sequential
19 evaluation. 20 C.F.R. §§ 404.1525 and 416.935 and *Parra v.*
20 *Astrue*.¹ He found without DAA, plaintiff's impairments would be
21 severe but would not meet or equal the Listings (steps 2 and
22 3)(Tr. 23). He found plaintiff has no relevant work (step 4).
23 Relying on the VE's testimony, the ALJ found when DAA is excluded,
24 there are jobs a person with plaintiff's RFC could do (step 5)(Tr.
25 25). The ALJ found DAA was a contributing factor material to the
26

27 ¹*Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007), cert.
28 *denied*, 128 S. Ct. 1068 (2008).

1 disability determination (Tr. 25-26). Accordingly, he found
2 plaintiff is barred from receiving benefits and is therefore not
3 disabled as defined by the Social Security Act (Tr. 26).

4 **ISSUES**

5 Plaintiff contends the Commissioner erred when he weighed the
6 opinions of examining professionals, assessed credibility, and
7 asked the VE a hypothetical lacking all of plaintiff's impairments
8 (Ct. Rec. 18 at 11). In the Commissioner's view the ALJ properly
9 (1) gave the greatest weight to the opinion of treating doctor
10 Joseph Vickers, M.D.; (2) weighed the opinions of examining
11 professionals Jay Toews, Ed.D., Christopher Clark, M.Ed., and
12 Martha Usatine, MSW (Ct. Rec. 20 at 7-10); (3) assessed
13 plaintiff's credibility (Ct. Rec. 20 at 11-14), and (4) included
14 all of plaintiff's established mental limitations in the
15 hypothetical (Ct. Rec. 20 at 14-15). Asserting the decision is
16 free of legal error and supported by substantial evidence, the
17 Commissioner asks the Court to affirm (Ct. Rec. 20 at 15).

18 **DISCUSSION**

19 **A. Weighing medical evidence**

20 In social security proceedings, the claimant must prove the
21 existence of a physical or mental impairment by providing medical
22 evidence consisting of signs, symptoms, and laboratory findings;
23 the claimant's own statement of symptoms alone will not suffice.
24 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
25 on the basis of a medically determinable impairment which can be
26 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
27 medical evidence of an underlying impairment has been shown,
28 medical findings are not required to support the alleged severity

1 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cr.
2 1991).

3 A treating physician's opinion is given special weight
4 because of familiarity with the claimant and the claimant's
5 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9th Cir.
6 1989). However, the treating physician's opinion is not
7 "necessarily conclusive as to either a physical condition or the
8 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
9 751 (9th Cir. 1989)(citations omitted). More weight is given to a
10 treating physician than an examining physician. *Lester v. Cater*,
11 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
12 given to the opinions of treating and examining physicians than to
13 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
14 (9th Cir. 2004). If the treating or examining physician's opinions
15 are not contradicted, they can be rejected only with clear and
16 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
17 ALJ may reject an opinion if he states specific, legitimate
18 reasons that are supported by substantial evidence. See *Flaten v.*
19 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
20 1995).

21 In addition to the testimony of a nonexamining medical
22 advisor, the ALJ must have other evidence to support a decision to
23 reject the opinion of a treating physician, such as laboratory
24 test results, contrary reports from examining physicians, and
25 testimony from the claimant that was inconsistent with the
26 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
27 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
28 Cir. 1995).

1 **II. Opinions of treating and examining professionals**

2 Plaintiff alleges the ALJ's failure to give reasons for
3 rejecting the opinions of three examining professionals is "clear
4 legal error"(Ct. Rec. 18 at 15-16). The Commissioner asserts the
5 ALJ appropriately relied instead on the opinion of Dr. Vickers,
6 whose opinion as a treating physician is entitled to greater
7 weight (Ct. Rec. 29 at 7-8).

8 On October 14, 2005 (about two months before onset), Dr.
9 Vickers saw plaintiff for complaints of bipolar disorder, anxiety,
10 intravenous drug use, cardiac problems, and numbness in the legs
11 and arms (Tr. 193). He notes seeing Ms. Wake once previously in
12 the hospital [in January of 2005] for an infection caused by IV
13 drug injection (Tr. 143-144; Tr. 177-179). Dr. Vickers notes
14 plaintiff states celexa helped in the past. She last abused
15 substances on August 25, 2005 (Id). He diagnosed two mental
16 disorders: bipolar disorder causing very significant interference
17 in the ability to perform one or more basic work activities, and
18 DAA causing the inability to perform one or more work activities
19 (Tr. 195). Dr. Vickers opined plaintiff may need ongoing treatment
20 for mental health and DAA (Tr. 143, 193). The ALJ points out Dr.
21 Vickers opined bipolar disorder is aggravated by DAA. If plaintiff
22 remained abstinent for 60 days and received treatment for bipolar
23 disorder, Dr. Vickers opined she should be employable within two
24 to six months (Tr. 16, referring to 196). Vickers discussed
25 plaintiff's need to follow up with mental health and gave her
26 samples of psychotropic medication, seroquel and lexapro (Tr.
27 143).

28 When Dr. Vickers saw plaintiff for medication follow up on

1 November 1, 2005, the "medication seems to have helped; overall it
2 sounds like she is doing pretty well." Plaintiff was going to
3 enter a 28-day DAA program and return after completion. She "looks
4 well, appropriate speech" (Tr. 143).

5 Plaintiff did not reestablish care with Dr. Vickers until she
6 returned six months later, on May 8, 2006 (Tr. 142). As in January
7 of 2005, plaintiff needed medical attention for abscesses caused
8 by IV drug use (Tr. 142). Dr. Vickers points out plaintiff's
9 aftercare plan required at least weekly, if not daily, contact
10 between eleven a.m. and noon [Dr. Vickers is unclear if she was
11 required to report to her parole officer or to the treatment
12 agency]. In either case Ms. Wake has not been in "for a week or
13 so, maybe a couple of weeks" (Tr. 142). She appears clearly very
14 anxious and admits symptoms consistent with agoraphobia (Tr. 141).
15 Dr. Vickers prescribed lithium for bipolar disorder and noted
16 plaintiff "will be following up with her parole officer and with
17 [the treatment agency] within the next day or two" (Tr. 141). Ms.
18 Wake did not return.

19 Plaintiff alleges the ALJ failed to adopt or properly reject
20 the "rather significant limitations [that] persisted even when Ms.
21 Wake was clean and sober." (Ct. Rec. 18 at 16, referring to the
22 reports of Mr. Clark at Tr. 188-189 and Ms. Usatine at Tr. 198-
23 199). She alleges "the ALJ proceeded as though there never had
24 been any periods of abstinence" (Ct. Rec. 18 at 15).

25 Remarkably, plaintiff fails to mention treating Dr. Vickers's
26 opinion her ability to work would be restored with abstinence and
27 2 to 6 months of treatment, a somewhat contradicted opinion
28 credited by the ALJ.

1 The ALJ considered the reports plaintiff describes. In his
2 report on October 19, 2005 (about two months before onset),
3 examining professional Mr. Clark notes a mental health evaluation
4 is pending. He indicates a sobriety date of "August 31, 2005 -
5 went to jail" (Tr. 17, referring to Tr. 187-192). Mr. Clark
6 assessed plaintiff's verbal expression of anxiety or fear and
7 social withdrawal as "markedly severe." He assessed as "moderate"
8 depressed mood, expression of anger, paranoid behavior, thought
9 disorder, and hyperactivity (Tr. 188). Mr. Clark opined plaintiff
10 has several marked and moderate functional limitations (Tr. 189).
11 He diagnosed bipolar disorder NOS, polysubstance dependence in
12 *reported remission*, panic disorder with agoraphobia and dependent
13 personality disorder (Id). (emphasis added).

14 Mr. Clark notes plaintiff is starting NA groups; cannot
15 access mental health treatment due to funding issues; recently
16 began taking two antidepressant medications; and treatment results
17 to date include "attended rescheduled assessment" (Tr. 189-190).
18 He opined an updated DAA assessment is needed (Tr. 189-190).
19 Plaintiff apparently argues the ALJ should have credited Mr.
20 Clark's observation plaintiff was "still appearing to have
21 unstable mood after 45 days of abstinence." The argument is not
22 well founded given Mr. Clark's diagnosis plaintiff's DAA was in
23 *reported remission*, and the ALJ found plaintiff's reporting
24 unreliable (below).

25 The ALJ considered Ms. Usatine's report. Following
26 plaintiff's GAU examination, apparently in November of 2006,² Ms.

28 ²The ALJ notes the dates throughout Ms. Usatine's report
indicate the date should read 2006, rather as listed, 2008
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1 Usatine diagnosed bipolar disorder, most recent episode depressed,
2 and PTSD (Tr. 19, referring to Tr. 198). Plaintiff recently
3 completed in-patient DAA treatment and is currently in outpatient
4 treatment; DAA remission is "early"; any use would exacerbate
5 symptoms (Tr. 198-199). Ms. Usatine assessed marked and moderate
6 limitations, noting plaintiff currently took no medication to
7 reduce symptoms. (Tr. 197-202). Ms. Usatine opined medication will
8 stabilize mood and therapy will assist plaintiff in managing her
9 life. She opined (in a manner similar to Dr. Vickers) medication
10 and therapy would likely restore plaintiff's ability to work (Tr.
11 199-200).

12 The ALJ considered Dr. Toews's report following his
13 examination on April 25, 2006 (about four months after onset):

14 She stated she found prostitution an easy and
15 convenient income source. . . She stated she last
16 used drugs about 30 days ago, using cocaine,
17 methamphetamines, heroin, and alcohol. . . She had
18 been in three 28-day inpatient programs and one
19 90-day inpatient program. She relapsed fairly
20 frequently, stating it was because she would become
21 depressed and overwhelmed. . .

22 She stated she was able to maintain attention and
23 concentration. She had been on medication for about
24 a month given by Dr. Vickers, but quit treatment and
25 discontinued medications. . .

26 She watched a lot of TV. She was fully independent
27 for basic self care and had a full complement of independent
28 living skills. She planned and prepared
meals, did light and heavy housekeeping, and laundry.
She shopped and used public transportation. . . She
had no friends but enjoyed visitation with her children.
She was able to do some gardening, yard work, and

(Tr. 19; Tr. 200); cf. Tr. 197 (plaintiff's signed release for Ms.
Usatine is dated November 8, 2006); Ms. Usatine's observations are
signed and dated November 8, 2006 (Tr. 202).
The court assumes for purposes of the appeal the ALJ's date
of November 2006, repeated in the Commissioner's brief, is correct.

1 handicrafts. . .

2 Diagnosis was polysubstance abuse, episodic, alcohol
3 abuse, episodic, major depressive disorder,
4 substance related, chronic, substance related
5 anxiety disorder, borderline personality disorder,
6 and [a GAF] of 50. Dr. Toews reported that he did
7 not find symptoms referable to a bipolar disorder,
8 which had been diagnosed by Dr. Vickers. Dr. Toews
9 noted she had a long history of polysubstance
10 dependence and alcohol abuse and was at high risk
11 for relapse. She was noncompliant with chemical
12 dependency treatment and psychiatric treatment.
13 Referral for substance abuse evaluation was
14 recommended, as frequency was probably greater than
15 admitted.

16 (Tr. 18-19).

17 To aid in weighing the conflicting medical evidence, the ALJ
18 evaluated plaintiff's credibility and found her less than fully
19 credible (Tr. 22). Credibility determinations bear on evaluations
20 of medical evidence when an ALJ is presented with conflicting
21 medical opinions or inconsistency between a claimant's subjective
22 complaints and diagnosed condition. *See Webb v. Barnhart*, 433 F.3d
23 683, 688 (9th Cir. 2005).

24 It is the province of the ALJ to make credibility
25 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
26 1995). However, the ALJ's findings must be supported by specific
27 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
28 1990). Once the claimant produces medical evidence of an
underlying medical impairment, the ALJ may not discredit testimony
as to the severity of an impairment because it is unsupported by
medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
1998). Absent affirmative evidence of malingering, the ALJ's
reasons for rejecting the claimant's testimony must be "clear and
convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).

"General findings are insufficient: rather the ALJ must identify

1 what testimony not credible and what evidence undermines the
2 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
3 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

4 The ALJ relied on several factors when he assessed
5 credibility, including plaintiff's inconsistent statements and
6 noncompliance with mental health treatment (Tr. 22).

7 The ALJ points out plaintiff testified at the hearing in
8 October of 2008 she last consumed alcohol a month prior to the
9 hearing. Before this recent use, Ms. Wake testified she last drank
10 alcohol two years ago (Tr. 22; Tr. 238). The ALJ observes Ms.
11 Wake's testimony is contradicted by her statement in October of
12 2007 she drank recently (Tr. 22, referring to Tr. 206). This
13 reason is clear, convincing, and fully supported by the evidence.

14 With respect to noncompliance, the ALJ states:

15 Records show that she is medically noncompliant even
16 though she testified that mediation and therapy have
17 helped her and she has improved. Chemical dependency
18 treatment records at 1F/21 indicated that her response
19 to treatment was poor and she appeared to have
20 difficulty taking responsibility for her behavior and
21 displayed an unwillingness to change her own behavior.

22 (Tr. 22).

23 The treatment record referred to by the ALJ states

24 [Ms. Wake's] response to treatment was poor. She had
25 an apparent difficulty taking responsibility for
26 change. She displayed an ability to understand
27 behavior, but an inability or unwillingness to change
28 her own behavior. It may be that [her] dependency
upon others, including an abusive relationship [has]
alleviated the need to change. Throughout treatment
she focused upon multiple layers of distractions to
prevent or deny the need for other necessary changes.
[Plaintiff] has both stated and shown that she is not
yet ready to change her behavior and the [negative]
consequences do not yet appear to outweigh the [positive]
consequences for this individual.

(Tr. 138).

1 The ALJ's reasons for finding plaintiff less than credible
2 are clear, convincing and supported by substantial evidence. See
3 *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002)(proper
4 factors include inconsistencies in plaintiff's statements). An
5 "unexplained, or inadequately explained, failure to seek treatment
6 or follow a prescribed course of treatment" can cast doubt on a
7 claimant's sincerity. *Fair v. Bowen*, 885 F.2d 597,603 (9th Cir.
8 1989).

9 Plaintiff's reliance on *Regennitter v. Commissioner of Soc.*
10 *Sec. Admin.*, 166 F.3d 1294,(9th Cir. 1999) is unavailing because
11 the ALJ's specific reasons for discounting Mr. Regennitter's
12 testimony were not supported by substantial evidence in the
13 record, a situation dissimilar to this case. In the court's view,
14 because some of the opinions were based on the self reporting of
15 an unreliable person, the ALJ could legitimately accord them less
16 weight. An opinion of disability premised to a large extent upon
17 the claimant's own accounts of his symptoms and limitations may be
18 disregarded, once those complaints have themselves been properly
19 discounted. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995)
20 (citing *Flaten v. Secretary of Health & Human Services*, 44 F.3d
21 1453, 1463-1464 (1995)).

22 The ALJ is responsible for reviewing the evidence and
23 resolving conflicts or ambiguities in testimony. *Magallanes v.*
24 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
25 trier of fact, not this court, to resolve conflicts in evidence.
26 *Richardson*, 402 U.S. at 400. The court has a limited role in
27 determining whether the ALJ's decision is supported by substantial
28 evidence and may not substitute its own judgment for that of the

1 ALJ, even if it might justifiably have reached a different result
2 upon de novo review. 42 U.S.C. § 405 (g).

3 The ALJ gave clear and convincing reasons supported by
4 substantial evidence for his credibility determination.

5 Plaintiff asserts the ALJ "provided no reason at all" for
6 rejecting her statement she "goes through 'highs and lows' even
7 when she is not abusing drugs" (Ct. Rec. 18 at 16, referring to
8 Tr. 119). The ALJ found plaintiff is not credible. Contrary to her
9 assertion, the statement does not establish Ms. Wake "continued to
10 suffer very significant limitations even when clean and sober,"
11 because the only evidence of abstinence is her unreliable self-
12 report (Id). The ALJ was not required to credit plaintiff's
13 unreliable statement.

14 The ALJ considered the November of 2005 report (a month
15 before onset) of Heather McClure, ARNP, who diagnosed in relevant
16 part polysubstance dependence in early *partial* remission and a GAF
17 of 45 (Tr. 17-18, referring to Exhibit 1F/17-19 at Tr. 134-
18 136)(emphasis added).

19 The ALJ observes:

20 Examiners have repeatedly indicated that symptoms
21 are made worse by substance abuse/dependence and
22 without treatment [citations omitted]. There is
23 evidence of ongoing use as she testified at the
24 hearing that she had been drinking the month before
25 the hearing. . . Examiners have repeatedly reported
26 [GAFs] of 45-51, indicating poor social or
27 occupational functioning, with associated moderate
28 to marked limitations in social and cognitive
29 functioning. In light of ongoing substance abuse,
30 the undersigned finds that these scores represent
31 her functioning when considering drug and alcohol
32 dependence.

33 (Tr. 22).

34 The court may draw inferences from ALJ's decision. The clear

1 inference is that the ALJ disbelieved plaintiff's claimed periods
2 of sobriety. The record fully supports this inference. The only
3 evidence of abstinence other than plaintiff's unreliable self-
4 report is one negative UA in October of 2007 (Tr. 210). The ALJ
5 observes plaintiff has failed to comply with both DAA and mental
6 health treatment. The ALJ is permitted to consider lack of
7 treatment in his credibility determination. *Burch v. Barnhart*, 400
8 F.3d 676, 681 (9th Cir. 2005). The ALJ could properly discount
9 Clark and Usatine's opinions of limitations without DAA because
10 they appear to be based on plaintiff's unreliable self reported
11 abstinence. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th
12 Cir. 2001). The ALJ did not err when weighing the opinion evidence
13 and plaintiff's credibility.

14 **II. Step Five**

15 Plaintiff's step five argument essentially asks the court to
16 re-weigh the evidence, a task the court cannot do. The ALJ
17 assessed an RFC (when DAA is excluded) limiting plaintiff to work
18 involving superficial contact with co-workers and the public. From
19 the ALJ's statements and assessed RFC, it is clear he rejected
20 Clark and Usatine's opinions (to the extent they opined plaintiff
21 is more limited without DAA) because he found Ms. Wake not
22 credible, including her claimed periods of abstinence; properly
23 rejected opinions based on plaintiff's unreliable self report, See
24 *Bayliss v. Barnhart*, 427 F.3d 1211,1217 (9th Cir. 2005), and
25 weighed more heavily the opinion of her treating doctor that with
26 abstinence and treatment plaintiff would be able to work.

27 The RFC assessed by the ALJ is fully supported by the
28 evidence, including treating and examining health care providers,

1 and without legal error. Accordingly, the RFC and questions to the
2 VE are sufficient. *See Osenbrock v. Apfel*, 240 F.3d 1157, 1165
3 (9th Cir. 2001).

4 The RFC is supported by the ALJ's assessment of plaintiff's
5 credibility. Because the RFC and questions to the VE are based on
6 the limitations the ALJ found supported by credible evidence, both
7 determinations are without error. For these reasons, plaintiff's
8 argument with respect to alleged error at step five fails.

9
10 **CONCLUSION**

11 Having reviewed the record and the ALJ's conclusions, this
12 court finds that the ALJ's decision is free of legal error and
13 supported by substantial evidence..

14 **IT IS ORDERED:**

15 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is
16 **GRANTED.**

17 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is
18 **DENIED.**

19 The District Court Executive is directed to file this Order,
20 provide copies to counsel for Plaintiff and Defendant, enter
21 judgment in favor of Defendant, and **CLOSE** this file.

22 DATED this 18th day of June, 2010.

23 s/ James P. Hutton

24 JAMES P. HUTTON
25 UNITED STATES MAGISTRATE JUDGE
26
27
28